APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 15219 SEPTEMBER TERM, 1965—JANUARY SESSION, 1966

Marathon Oil Company,
Plaintiff-Appellee,

v.

Gail Heath and The Baltimore & Ohio Railroad Company,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois.

MARCH 3, 1966

Before HASTINGS, *Chief Judge,* KNOCH, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is a diversity action in which the Marathon Oil Company, an Ohio corporation and successor of The Ohio Oil Company, sued Gail Heath and The Baltimore & Ohio Railroad Company for a declaration that certain gas and oil leases owned by the plaintiff include a part of the right of way over which the defendant railroad operates its trains in Lawrence County, Illinois. The plaintiff also requested an injunction prohibiting the defendants from drilling for oil and gas upon the lands in question.[1] The district court entered findings of fact

[1] On June 1, 1961, defendant Heath entered into an oil and gas lease with the defendant railroad covering the right of way in question. During the pendency of this action Heath drilled a well on the leased premises. The proceeds from the oil produced have been impounded pending the outcome of this litigation.

and conclusions of law favorable to the plaintiff and by its decree granted the relief requested. This appeal followed.

The Ohio & Mississippi Railroad Company, predecessor in title to the B & O railroad, acquired the right of way in question by condemnation in 1853. The right of way is a parcel of land one hundred and fifty feet in width through the south half of the southeast quarter of section 7, township 3 north, range 12 west, Lawrence County, Illinois. The north and south boundaries of this strip run parallel with the railroad track, seventy-one and seventy-nine feet respectively from the centerline of the track.[2]

The district court construed the condemnation proceedings as granting the railroad merely an easement over the lands condemned. The court held that the fee, including the rights to the mineral deposits, remained in the persons who owned the lands at the time of the condemnation proceedings and that their titles passed by mesne conveyances to the landowners who entered into oil and gas leases with the plaintiff. The court also found that a portion of the right of way which lies south of an old wire fence running parallel to the railroad track had been abandoned by the railroad more than fifty years ago.[3] The court fur-

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[2] At the time of the condemnation proceedings, the lands taken were part of two parcels, one owned by the widow and heirs of Joshua Dudley, deceased, and the other by Commadore P. Phillips. Subsequent to the condemnation proceedings, these lands were subdivided into three parcels, each parcel having a different owner. The parcels are currently known as the Finley tract, the Lanich tract, and the Griggs tract. The plaintiff's oil and gas leases cover these tracts.

[3] The part of the right of way lying south of the fence is approximately twenty-nine feet in width.

ther found that the lessors of the plaintiff and their privies in title have been in "open, notorious, exclusive, hostile and adverse possession" of the "abandoned" part of the right of way for a similar period. The court concluded that the defendants are barred from claiming any interest in the "abandoned portion" of the right of way.

I.

The first issue is whether the B & O railroad has a fee interest in its right of way, subject only to the oil and gas lease granted to defendant Heath, or whether it has merely an easement. The question is one of law, to be resolved by a consideration of the Illinois statutes upon which the condemnation proceedings of 1853 were based and the decisions interpreting these statutes.

The formation of the O & M railroad was authorized by the Illinois legislature February 12, 1851. The railroad was empowered to "lay out, designate and establish" a road not exceeding one hundred and fifty feet in width, to appropriate to its own use all the lands so designated, and to "take grants and conveyances of any and all interests and estates therein." The statute provided that in the event the lands designated could not be obtained by voluntary purchase, "the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An Act to Provide for a General System of Railroad Incorporations.' " The latter statute, approved November 5, 1849, set out a condemnation procedure not material here. The statute did, however, contemplate the taking of a fee by a railroad for use in the construction of its tracks, and thus is material in indicating the powers which the O & M railroad obtained by its legislative charter.

The condemnation actions instituted by the O & M railroad to acquire the right of way in question were prosecuted under an Illinois statute passed June 22, 1852 en-

titled "An Act to Amend the Law Condemning Right of Way for Purposes of Internal Improvement."[4] This statute specifically authorized railroad corporations previously chartered by the legislature to avail themselves of its provisions. It provided for the filing of a petition with the circuit court of the county where the lands proposed to be taken were located, indicating the purpose of the taking. It required the appointment of commissioners to fix the compensation to be awarded the owners of the land and a report of the finding of the commissioners to the court. The act then provided that "upon the making and filing of any report . . . any party interested may appeal . . . but if no appeal is taken, the decisions, estimates and assessments as reported, shall be conclusive . . . and the right and title to that part of each tract required, in respect to which compensation is allowed or damages assessed, shall vest in the . . . corporation . . . upon the payment of the compensation and damages so fixed or assessed. . . ."

The records of the 1853 condemnation proceedings here involved show that they conformed in all respects to the requirements of the 1852 statute. Each petition described the tracts proposed to be taken. Each requested the court to appoint commissioners for the purpose of fixing the compensation to be awarded the owners and further requested that upon payment, "the owners . . . may be required to make and deliver . . . a conveyance or release in fee" to the O & M railroad. The record shows that commissioners were appointed, the compensation to be awarded was set, no appeal was perfected, and payment in the amounts assessed was made. The proceedings in their entirety reflect an intention on the part of the railroad to take an interest

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[4] The 1849 statute was specifically mentioned in the condemnation proceedings, but the parties agree that these proceedings were conducted under the act of June 22, 1852.

in the lands condemned commensurate with the power granted by its charter.

The Illinois Supreme Court has considered the 1852 statute and has held that railroad instituting condemnation proceedings under it acquired fee simple title to the lands condemned. In *Bartlow* v. *Chicago, B. & Q. R. R.*, 243 Ill. 332, 336, 90 N.E. 721 (1909), the court stated:

> Under the statute then in force [the act of June 22, 1852] when property was taken and condemned for public use the condemnation was of the entire property, and the assessment of damages was held to be in satisfaction of all the title to the property, including the fee simple and all lesser estates.

A subsequent case, *Keen* v. *Cleveland, C. C. & St. L. Ry.*, 392 Ill. 362, 64 N.E. 2d 499 (1945), concerned the question of whether a certain deed to a strip of land used for the purpose of a right of way conveyed a fee simple title to The Cairo & Vincennes Railroad Company. That railroad was organized under a special act of the Illinois legislature in 1867 and was empowered to acquire and appropriate as much land as might be necessary for a right of way.[5] The question arose as to whether the railroad had been empowered to take a fee interest in those lands it acquired by voluntary conveyance. In the course of its decision, the court said:

> The eminent domain act of June 22, 1852, referred to in section 4 of the special act creating The Cairo & Vincennes Railroad Company, was construed by this court in Bartlow v. Chicago, Burlington and Quincy Railroad Co. . . . It was there held that in eminent domain proceedings under said act, the railroad company condemning the land acquired fee-simple title to

[5] The legislative charter of The Cairo & Vincennes Railroad Company is basically similar to that under which The Ohio & Mississippi Railroad Company was organized.

> the lands condemned. The rights in and the power to take real estate by . . . the eminent domain act referred to in section 4, was the right to take and acquire fee-simple title.
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> There was, therefore, by section 4 of the act . . ., specific authority conferred to acquire fee-simple title and all lesser estates in lands by condemnation under the act of June 22, 1852.
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> It is clear that under the special act creating The Cairo & Vincennes Railroad Company, that company was authorized and empowered to acquire and hold title to real estate in fee simple, either by condemnation or voluntary conveyance. 392 Ill. at 374-75.

From a reading of the act of June 22, 1852 and the decisions just cited, we conclude that the predecessor in title of the defendant railroad acquired a fee in the lands taken in the condemnation proceedings of 1853.[6] The cases relied upon by the plaintiff do not deal with the statutes pertinent to the case at bar and are inapposite for that reason.

II.

The remaining question is whether the adjoining landowners, the plaintiff's lessors, acquired title by adverse possession to the strip of land approximately twenty-nine feet wide lying south of the wire fence on the right of way condemned.

The district court ruled that the railroad had abandoned this strip and that the adjoining landowners had acquired title to it by adverse possession. We need not consider the

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[6] Section 13 of article II of the Illinois constitution, adopted in 1870, effected a change in the condemnation power of railroads from that granted by the statutes we have discussed by providing that railroads may acquire no more than an easement over the right of way taken. This change had no retroactive effect. Peoria & R.I. Ry. v. Birkett, 62 Ill. 332, 336 (1872).

question of abandonment inasmuch as we have already determined that the railroad acquired a fee simple title in its rights of way. A vested legal title to a corporeal interest cannot be lost by abandonment. *Chicago, Wilmington & Franklin Coal Co.* v. *Jilek,* 42 F. Supp. 200, 204 (E.D. Ill. 1942).

Under Illinois law the doctrine of adverse possession must be construed strictly in favor of the owner of the title to the land. *White* v. *Harris,* 206 Ill. 584, 592, 69 N.E. 519 (1903). To acquire title by adverse possession, the possession must be actual, visible, and exclusive. Moreover, it must be hostile in its inception and so continue without interruption for a period of twenty years. *Town of Kaneville* v. *Meredith,* 351 Ill. 620, 624, 184 N.E. 883 (1933). Casual physical acts tending to show a claim of ownership do not constitute adverse possession, and permissive possession, even if long continued, does not confer title on the person in possession. *Chicago & N. W. Ry.* v. *Kennedy,* 344 Ill. 309, 317-18, 176 N.E. 267 (1931); *Nitterauer* v. *Pulley,* 401 Ill. 494, 503, 82 N.E.2d 643 (1948). In *Hankey* v. *VanScyoc,* 338 Ill. 533, 536, 170 N.E. 749 (1930), the Illinois Supreme Court stated the requirements for acquiring title by adverse possession in these terms:

> The presumptions are in favor of the owner of the real title to the land, and to take it away from him on the claim of possession for twenty years the proof must show that the claimant possessed it for twenty years, claiming title and exercising rights of ownership over the land. The possession must be open, notorious, hostile and adverse and must be uninterrupted for a period of twenty years. . . . Adverse possession cannot be made out against the true owner by inference or implication but must be established by clear, positive and unequivocal proof.

Applying the foregoing principles to the evidence in this case, we are of the opinion that the plaintiff failed to establish title to the strip of land in its lessors by adverse possession, and that the district court's contrary determination was erroneous. The evidence showed the existence of a deteriorated wire fence located approximately fifty feet south of the centerline of the railroad track. The plaintiff presented testimony that the fence was at least sixty years old and that it was originally erected and maintained by the railroad to keep errant livestock off its track. The evidence further established that north-south "property line" fences between the Finley, Lanich, and Griggs tracts connected with the railroad's fence. There was also testimony that a portion of the disputed strip of land may have been farmed at one time by the owners of the three adjoining tracts. The testimony in this regard must be characterized as inconclusive. On the other hand, the evidence showed that most of the twenty-nine foot strip in controversy is and at all relevant times was dotted with trees and overgrown with brush. Some of the plaintiff's own witnesses conceded that to their knowledge the tree and brush-covered area had never been cultivated. Nor does the evidence support the inference that the fence erected by the railroad was intended as a boundary designation. From all that appears in the record, the fence was designed only to protect the railroad from possible liability for injury to wandering stock. Further, it appears that the defendant railroad and its predecessor have paid the taxes on the right of way since the condemnation proceedings in 1853.

Thus the plaintiff's burden of providing clear and unequivocal proof that its lessor-landowners acquired title to the disputed strip of land by adverse possession was not sustained.

The decree and judgment of the district court is reversed.

IN THE UNITED STATES DISTRICT COURT
* * (Caption—Civil No. 1882-D) * *

FINDINGS OF FACT and CONCLUSIONS OF LAW
(Filed Mar 15, 1965)

This cause coming on to be heard before the Honorable Casper Platt, Judge of the District Court of the United States for the Eastern District of Illinois, at 9:30 o'clock in the forenoon on the 19th day of October, 1964, on the complaint, as amended, the answers of the defendants, and the evidence of the parties hereto, and the Court having the evidence introduced in said cause, took the case under advisement upon the written briefs and arguments of the counsel for the parties, and being fully advised in the premises makes the following Findings of Fact and Conclusions of Law in this said cause:

Findings of Fact

(1)

That the plaintiff, Marathon Oil Company, an Ohio corporation, is a corporation organized, existing and legally incorporated under the laws of the State of Ohio, and is a citizen of the State of Ohio, having its principal place of business in the City of Findlay, State of Ohio, United States of America; that the defendant Gail Heath is a citizen, resident and inhabitant of the State of Illinois, and that the defendant The Baltimore & Ohio Rail-

road Company is a corporation legally incorporated in the State of Maryland, United States of America, and a citizen of that State having its principal place of business in the City of Baltimore, State of Maryland.

(2)

That the matters in controversy herein exceed, exclusive of interest and costs, the sum and value of Ten Thousand Dollars ($10,000.00).

(3)

That all the parties in this suit have, by their respective counsel, entered into a Stipulation of Facts which has been admitted in evidence in this case as Plaintiff and Defendants' Exhibit "A", and the Court finds that the facts set forth in said Exhibit are true and correct facts and are binding upon all parties to this action.

(4)

That on the 30th day of June, 1906, Amanda Long, unmarried, being then the owner of the following described premises, to-wit:

> The North part of the Southeast Quarter of the Southeast Quarter, containing thirty (30) acres, more or less, and the North part of the Southwest Quarter of the Southeast Quarter, containing thirty-two (32) acres, more or less, all in Section 7, Township 3 North, Range 12 West Lawrence County, Illinois, and all lying North of the B. & O. S. W. R. R., and six (6) acres, more or less, bounded as follows: on the north by said B. & O. S. W. R. R. track, on east by land owned by W. E. Finley, on the south by Indian Creek and on the south and west by Caney land, this

last described six (6) acres of land being part of Sections 7 and 18 and immediately south of the central part of the two tracts of land,

entered into an oil and gas lease on said date with Armor and Stewart, second parties, covering the above described premises, said lease being recorded in the office of the Recorder of Lawrence County, Illinois, in Book 3 page 228. A copy of said oil and gas lease is attached to the Complaint in this said cause and marked Exhibit "A" and is in evidence in this case.

(5)

That on the 3rd day of October, 1952, Bessie E. S. Finley, a widow; William E. Finley and Bessie Finley, his wife; Annie L. Mangum and Dr. W. R. Mangum, her husband; Thomas Finley and Jennie Finley, his wife; Alice Fisher and Leo Fisher, her husband, all of Lawrence County, Illinois; Lois Isabelle Beals and Robert Jennings Beals, her husband, of Urbana, Illinois; Guy W. Fish and Bertha E. Fish, his wife, of Atlanta, Georgia; Paul B. Finley and Genevieve Finley, his wife, of Jasper County, Illinois; Hazel E. Mitchell and Loren Mitchell, her husband, of Richland County, Illinois; Roberta Jane McPheron and Herschel James McPheron, her husband, of Tolono, Illinois; Martha M. Wilson and R. Raymond Wilson, her husband, of Arthur Illinois; Esther Stengel and Donald F. Stengel, her husband, of Mt. Morris, Ogle County, Illinois; and Frank Finley and Mae L. Finley, his wife, of Coles County, Illinois, being the owners of the following described real estate, viz:

All that part of the East 40 rods of the Southeast Quarter of the Southeast Quarter of the Southeast Quarter of Section 7, which lies South of the right-

of-way of the B. & O. S. W. R.R., containing five (5) acres, more or less, in Township 3 North, Range 12 West, Lawrence County, Illinois,

and other premises, entered into an oil and gas lease with E. L. Crusse, party of the second part, of date the 8th of November, 1952, said lease being recorded in Book 33 at page 176 in the office of the Recorder of Lawrence County, Illinois. A true and correct copy of said oil and gas lease is attached to the Complaint in said cause and marked Exhibit "B" and is in evidence in this case.

(6)

That on the 30th day of September, 1958, Harold E. Griggs and Mildred L. Griggs, husband and wife, and John D. Bolles and Mary Bolles, husband and wife, being the owners of the following described real estate, viz:

All that part of the South ½ of the Southeast ¼ of Section 7 lying South of the Right-of Way of the Baltimore & Ohio Southwestern Railroad more particularly described as follows: Commencing at the Southwest corner of the South ½ of the Southeast ¼ of said Section 7, thence running East 94 rods 9 links to a post on the North line of the Northeast ¼ of the Northeast ¼ of Section 18, thence North 16 rods 16 links to the South line of the Right-of-Way of the Baltimore & Ohio Southwestern Railroad, thence West along the South line of the Right-of-Way of said Railroad approximately 94 rods and 18 links to a point on the West line of said South ½ of the Southeast ¼ of Section 7, thence South 6 rods and 8 links to the place of beginning, containing 5.59 acres, more or less, all situated in Township 3 North, Range 12 West, County of Lawrence, State of Illinois,

and other premises, entered into an oil and gas lease with The Ohio Oil Company, now Marathon Oil Company, said lease being recorded in Book 43 pages 59-61 of Oil and Gas Records in the office of the Recorder of Lawrence County, Illinois. A true and correct copy of said lease is attached to the Complaint in this cause and marked Exhibit "C" and is in evidence in this case.

(7)

By virtue of condemnation proceedings conducted in 1853 the Ohio and Mississippi Railroad Company, predecessor of defendant herein, The Baltimore & Ohio Railroad Company, acquired a right of way through the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that by virtue of such condemnation proceedings the Ohio and Mississippi Railroad Company acquired merely an easement over and across the surface of a tract 150 feet in width through the South Half of the Southeast Quarter of said Section 7; that the title to the oil and gas therein and thereunder did not pass by virtue of such condemnation proceedings but remained in the then landowners and has passed to the lessors of plaintiff herein, and that defendant The Baltimore & Ohio Railroad Company has acquired said right of way by mesne conveyances from said the Ohio and Mississippi Railroad Company.

(8)

That a part of the right of way acquired by the Ohio and Mississippi Railroad Company under said condemnation proceedings was abandoned by said railroad company and its successors in title more than fifty years ago, said abandoned part being more specifically identified and described as follows:

All that part of said right of way described in said condemnation proceedings which lies South of and adjacent to a fence which is located South of the center line of that portion of the main track of the Southeast Quarter of said Section 7, the location of said fence through the South Half of the Southeast Quarter of said Section 7 being shown on Plaintiff's Exhibit No. 1 in evidence in this case—the plat prepared by Marbry & Johnson, Surveyors.

That neither of the defendants has any right, title or interest in said abandoned part of said right of way; that the fence mentioned above in the description of said abandoned part of said right of way was erected more than fifty years ago by said Ohio and Mississippi Railroad Company or a successor in title; that the lessors of the plaintiff and their privies in title have been in the open, notorious, exclusive, hostile and adverse possession of said abandoned part of said railroad right of way for more than fifty years last past and during said period have claimed to own the same in fee simple, including the oil, gas and other minerals therein and thereunder, as well as the surface; that as to the balance of said right of way, defendant The Baltimore & Ohio Railroad Company owns no more than an easement; and that in the year 1960 the plaintiff drilled its Lanich No. 13 well on that part of the right of way which plaintiff's lessors had acquired by adverse possession as herein set forth, being that portion of the right of way South of the fence built by said railroad company on the South side of said right of way.

(9)

That plaintiff, Marathon Oil Company, is the owner of each and all said oil and gas leases, and the leasehold estates created thereby; that under and by virtue of

said leases said plaintiff has the exclusive right to drill for oil and gas upon, and produce and remove oil and gas from, the tracts of land respectively described in said oil and gas leases; and under and by virtue thereof has drilled several producing wells on said premises and is currently producing oil and gas therefrom; and that said leases are in full force and effect.

(10)

That the oil and gas leasehold estates created by said oil and gas leases respectively extend from the north and south sides to the center of the right of way of The Baltimore & Ohio Railroad Company through the South Half of the Southeast Quarter of said Section 7; that all of said leases collectively include and cover all of the right of way of defendant The Baltimore & Ohio Railroad Company through the South Half of the Southeast Quarter of said Section 7; that said leases convey to plaintiff an oil and gas leasehold estate covering all the oil and gas in and under the right of way of said The Baltimore & Ohio Railroad Company; that said leases, and the leasehold estates created thereby, collectively include and cover all the oil and gas in and under the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that under and by virtue thereof the plaintiff, Marathon Oil Company, has the exclusive right to drill for, and produce oil and gas from, the entire South Half of the Southeast Quarter of said Section 7, including the right of way of said defendant The Baltimore & Ohio Railroad Company, subject to the right of said defendant to construct and maintain its railroad tracks on that portion of the easement as to which there has been no abandonment thereof by said defendant and its predecessors in title.

(11)

That defendant The Baltimore & Ohio Railroad Company has no right, title and interest in and to the oil and gas in and under its right of way as it extends across and through the South Half of the Southeast Quarter of said Section 7; that defendant The Baltimore & Ohio Railroad Company, a corporation, wrongfully and without any right, title or interest in and to the oil and gas in and under said premises, on the first day of June, 1961, entered into a purported oil and gas lease with defendant Gail Heath covering, among other lands, the right of way of said railroad as it extends across and through the South Half of the Southeast Quarter of said Section 7, said oil and gas lease being recorded in Miscellaneous Record 10 at pages 550-559 in the office of the Recorder of Lawrence County, Illinois, a copy of said lease being attached to the Complaint and marked Exhibit "D" and made a part thereof.

(12)

That defendant Gail Heath made application to the State Mining Board of the State of Illinois for permits to drill two wells on the railroad right of way extending across and through the South Half of the Southeast Quarter of said Section 7; that since the filing of the complaint in, and during the pendency of, this cause, defendants have wilfully, illegally and wrongfully drilled a well for oil and gas on the right of way of The Baltmiore & Ohio Railroad Company which is located north of the South fence and South of the tracks of said railroad company at the place identified as staked location Gail Heath No. 2-A as shown on the plat prepared by Marbry & Johnson, Surveyors, and admitted in evidence herein as Plaintiff's Exhibit No. 1; that said well is still located

thereon and is being operated or is capable of being operated for the production of oil and gas; and that said defendants have produced oil by means of said well and that the proceeds from said oil have been impounded pending litigation.

(13)

That said Heath Well No. 2-A has been drilled on the railroad right of way in violation of the rights of plaintiff; that plaintiff, Marathon Oil Company, has been irreparably damaged by the drilling of said well; that property belonging to plaintiff has been wrongfully taken by said defendants and that in order to properly protect the right, title and interests of plaintiff under its said oil and gas leases, plaintiff is entitled to a judgment in accordance with the prayer of its complaint, including a permanent injunction enjoining said defendants from drilling upon the right of way for oil and gas and from occupying the same for the purpose of drilling for and producing oil and gas for the duration of the period that its oil and gas leases remain in force and effect upon said premises and further including a mandatory injunction that said Heath Well No. 2-A be abandoned and plugged by the defendants at their sole cost, risk and expense and all machinery and equipment used in connection with the pumping and operation of said well be removed from said premises by the defendants.

Conclusions of Law

(1)

That this Court has jurisdiction of this cause.

(2)

That a presumption exists that all conveyances of land touching or bordering upon railroad rights of way, which

are monuments, carry to the middle of said railroad rights of way, and that the defendants have not shown facts sufficient to overcome such presumptions.

(3)

That by virtue of the two condemnation proceedings instituted in 1853, the Ohio and Mississippi Railroad Company, predecessor of defendant The Baltimore & Ohio Railroad Company, acquired as a right of way for its tracks merely an easement over and across the surface of a tract 150 feet in width through the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that the title to the oil and gas in and under such right of way did not pass by virtue of such condemnation proceedings but remained in the then landowners and has passed to the lessors of plaintiff herein; and that the defendant The Baltimore & Ohio Railroad Company has acquired said right of way by mesne conveyances from the Ohio and Mississippi Railroad Company.

(4)

That there has been an abandonment by the Ohio and Mississippi Railroad Company and its successors in title of a part of the right of way acquired by said railroad company, said abandoned part being more specifically identified and described above under the "Findings of Fact"; that the defendants herein are barred from asserting any claim, right, title or interest in and to such abandoned portion of said railroad because the lessors of the plaintiff and parties who are in privity of title with them have been in the open, notorious, exclusive, hostile and adverse possession of said abandoned part of said railroad right of way; and that as to the balance of said right of way, defendant The Baltimore & Ohio Railroad Company owns only an easement.

(5)

That the lease bearing date June 30, 1906, from Amanda Long, unmarried, to Armor and Stewart covering the following described premises, viz:

> The North part of the Southeast Quarter of the Southeast Quarter, containing thirty (30) acres, more or less, and the North part of the Southwest Quarter of the Southeast Quarter, containing thirty-two (32) acres, more or less, all in Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois, and all lying North of the B. & O. S. W. R. R., and six (6) acres, more or less, bounded as follows: on the north by said B. & O. S. W. R. R. track, on east by land owned by W. E. Finley, on the south by Indian Creek and on the south and west by Caney land, this last described six (6) acres of land being part of Sections 7 and 18 and immediately south of the central part of the two tracts of land,

covers and includes lands running to the center of the right of way of The Baltimore & Ohio Railroad Company which bounds and abuts the lands hereinabove described on both the north and south sides thereof and the oil and gas in and under such lands; that said lease thus created an oil and gas leasehold estate covering lands running to the center of said right of way as aforesaid; and that said leasehold estate is now owned by plaintiff, Marathon Oil Company.

(6)

That the oil and gas lease bearing date October 3, 1952, from Bessie E. S. Finley, a widow; William E. Finley and Bessie Finley, his wife; Annie L. Mangum and Dr. W. R. Mangum, her husband; Thomas Finley and Jennie Finley,

his wife; Alice Fisher and Leo Fisher, her husband, all of Lawrence County, Illinois; Lois Isabelle Beals and Robert Jennings Beals, her husband, of Urbana, Illinois; Guy W. Fish and Bertha E. Fish, his wife, of Atlanta, Georgia; Paul B. Finley and Genevieve Finley, his wife, of Jasper County, Illinois; Hazel E. Mitchell and Loren Mitchell, her husband, of Richland County, Illinois; Roberta Jane McPheron and Herschel James McPheron, her husband, of Tolono, Illinois; Martha M. Wilson and R. Raymond Wilson, her husband, of Arthur, Illinois; Esther Stengel and Donald F. Stengel, her husband, of Mt. Morris, Ogle County, Illinois; and Frank Finley and Mae L. Finley, his wife, of Coles County, Illinois, to R. L. Crusse covering the following described lands, viz:

> All that part of the East 40 rods of the Southeast Quarter of the Southeast Quarter of the Southeast Quarter of Section 7, which lies South of the right-of-way of the B. & O. S. W. R. R., containing five (5) acres, more or less, in Township 3 North, Range 12 West, Lawrence County, Illinois,

covers and includes lands running to the center of the right of way of The Baltimore & Ohio Railroad Company which bounds and abuts the lands hereinabove described on the north side thereof and the oil and gas in and under such lands; that said lease thus created an oil and gas leasehold estate covering lands running to the center of said right of way as aforesaid; and that said leasehold estate is now owned by plaintiff herein, Marathon Oil Company.

(7)

That the oil and gas lease bearing date September 30, 1958, from Harold E. Griggs and Mildred L. Griggs, husband and wife, and John D. Bolles and Mary Bolles, hus-

band and wife, to The Ohio Oil Company covering the following described lands, viz:

> All that part of the South ½ of the Southeast ¼ of Section 7 lying South of the Right-of-Way of the Baltimore & Ohio Southwestern Railroad more particularly described as follows: Commencing at the Southwest corner of the South ½ of the Southeast ¼ of said Section 7, thence running East 94 rods 9 links to a post on the North line of the Northeast ¼ of the Northeast ¼ of Section 18, thence North 16 rods 16 links to the South line of the Right-of-way of the Baltimore & Ohio Southwestern Railroad, thence West along the South line of the Right-of-Way of said Railroad approximately 94 rods and 18 links to a point on the West line of said South ½ of the Southeast ¼ of Section 7, thence South 6 rods and 8 link to the place of beginning, containing 5.59 acres, more or less, all situated in Township 3 North, Range 12 West, County of Lawrence, State of Illinois,

covers and includes lands running to the center of the right of way of The Baltimore & Ohio Railroad Company which bounds and abuts the lands hereinabove described on the north side thereof and the oil and gas in and under such lands; that said lease thus created an oil and gas leasehold estate covering lands running to the center of said right of way as aforesaid; and, that said leasehold estate is now owned by plaintiff, Marathon Oil Company.

(8)

That the three oil and gas leases hereinabove described owned by plaintiff, copies of which are attached to the Complaint as Exhibits "A," "B" and "C," and the leasehold estates created thereby, collectively include and cover

all of the right of way, and the oil and gas therein and thereunder, of The Baltimore & Ohio Railroad Company through the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that said leases, and the leasehold estates created thereby, collectively include and cover all the oil and gas in and under the South Half of the Southeast Quarter of said Section 7; that under and by virtue thereof the plaintiff, Marathon Oil Company, has the exclusive right to conduct oil and gas drilling operations on, and produce oil and gas from, the entire South Half of the Southeast Quarter of said Section 7, including the right of way of said defendant The Baltimore & Ohio Railroad Company, subject to the right of said defendant to construct and maintain its railroad tracks on that portion of its right of way as to which there has been no abandonment thereof by said defendant and its predecessors in title.

(9)

That the defendants have no claim, right, title or interest in and to the oil and gas in and under the railroad right of way through the South Half of the Southeast Quarter of said Section 7; that defendant The Baltimore & Ohio Railroad Company is not entitled to lease the same for oil and gas and that neither of said defendants has any right to drill a well thereon and to produce oil and gas thereon and therefrom.

(10)

That the lease made by The Baltimore & Ohio Railroad to defendant Heath, copy of which is attached to the Complaint as Exhibit "D," did not vest any right, title or interest in the said defendant Heath in or to the oil and gas or other minerals in and under any part of the lands in the South Half of the Southeast Quarter of said Section 7.

(11)

That plaintiff, Marathon Oil Company, will be irreparably damaged if the defendants are permitted to drill wells on said right of way or operate wells thereon for the production of oil and gas, and that plaintiff has been irreparably damaged by the drilling of a well on said right of way and by the production of oil and gas therefrom which the defendants have done wilfully, wrongfully and illegally.

(12)

That plaintiff is entitled to a permanent injunction enjoining defendants Gail Heath and The Baltimore & Ohio Railroad Company, a Maryland corporation, and their employees, agents, successors and assigns from drilling upon or occupying or remaining in possession of the railroad right of way through the South Half of the Southeast Quarter of Section 7 for the purpose of drilling upon and from endeavoring to drill thereon for the recovery and production of oil and gas; that plaintiff is entitled to a mandatory injunction against the defendants in this cause requiring them to plug and abandon the well which has been drilled thereon known and identified as Heath Well #2-A and requiring them to remove from the said railroad right of way all machinery and equipment and any other material used in the operation of said well or for the production of oil and gas from said railroad right of way.

(13)

That plaintiff has the right to continue to produce its Lanich Well No. 13 and to receive the oil and gas therefrom and to dispose of the same in accordance with the terms of its oil and gas lease.

Dated this 15th day of March, 1965.

/s/ Casper Platt
United States District Judge
(Seal)

IN THE UNITED STATES DISTRICT COURT
* * (Caption—Civil No. 1882-D) * *

DECREE
(Filed Mar 15, 1965)

This cause having come on for final hearing before the Honorable Casper Platt, Judge of the United States District Court for the Eastern District of Illinois, on the Complaint herein as amended, the Answers of the defendants to the Complaint as amended, and evidence and stipulations of the parties hereto, and having heard the arguments of counsel and having made Findings of Fact and Conclusions of Law, which are filed with the Clerk of this Court at the same time as this Decree herein, and being fully advised in the premises, Therefore, Upon consideration thereof,

It Is Ordered, Adjudged And Decreed as follows:

(1)

That the equities in this cause are with the plaintiff, Marathon Oil Company, an Ohio corporation, and that plaintiff is entitled to the relief as prayed in the complaint as amended.

(2)

That by virtue of condemnation proceedings conducted in 1853, the Ohio and Mississippi Railroad Company, predecessor of defendant The Baltimore & Ohio Railroad Company, acquired as a right of way for its tracks merely an easement over and across the surface of a tract of land 150 feet in width through the South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois; that the title

to the oil and gas in and under such right of way did not pass by virtue of such condemnation proceedings but remained in the then landowners and has passed to the lessors of the plaintiff herein; and that defendant The Baltimore & Ohio Railroad Company has acquired said right of way by mesne conveyances from the Ohio and Mississippi Railroad Company.

(3)

That plaintiff, Marathon Oil Company, is the owner of oil and gas leases which are in full force and effect, and the leasehold estates created thereby, covering the following described lands, to-wit:

A. The North part of the Southeast Quarter of the Southeast Quarter, containing thirty (30) acres, more or less, and the North part of the Southwest Quarter of the Southeast Quarter, containing thirty-two (32) acres, more or less, all in Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois, and all lying North of the B. & O. S. W. R. R., and six (6) acres, more or less, bounded as follows: on the north by said B. & O. S. W. R. R. track, on east by land owned by W. E. Finley, on the south by Indian Creek and on the south and west by Caney land, this last described six (6) acress of land being part of Section 7 and 18 and immediately south of the central part of the two tracts of land,

B. All that part of the East 40 rods of the Southeast Quarter of the Southeast Quarter of the Southeast Quarter of Section 7, which lies South of the right-of-way of the B. & O. S. W. R. R., containing five (5) acres, more or less, in Township 3 North, Range 12 West, Lawrence County, Illinois,

C. All that part of the South ½ of the Southeast ¼ of Section 7 lying South of the Right-of-Way of the Baltimore & Ohio Southwestern Railroad more particularly described as follows: Commencing at the Southwest corner of the South ½ of the Southeast ¼ of said Section 7, thence running East 94 rods 9 links to a post on the North line of the Northeast ¼ of the Northeast ¼ of Section 18, thence North 16 rods 16 links to the South line of the Right-of-Way of the Baltimore & Ohio Southwestern Railroad, thence West along the South line of the Right-of-Way of said Railroad approximately 94 rods and 18 links to a point on the West line of said South ½ of the Southeast ¼ of Section 7, thence South 6 rods and 8 links to the place of beginning, containing 5.59 acres, more or less, all situated in Township 3 North, Range 12 West, County of Lawrence, State of Illinois.

(4)

That the aforesaid oil and gas leases owned by plaintiff, and the leasehold estates created thereby, collectively include and cover all of the right of way, and the oil and gas therein and thereunder, of The Baltimore & Ohio Railroad Company through the South Half of the Southeast Quarter of said Section 7; that said leases, and the leasehold estates created thereby, collectively include and cover all the oil and gas in and under the South Half of the Southeast Quarter of said Section 7; that under and by virtue thereof the plaintiff, Marathon Oil Company, has the exclusive right to conduct oil and gas drilling operations on, and produce oil and gas from, the entire South Half of the Southeast Quarter of said Section 7, including the right of way of said defendant The Baltimore & Ohio Railroad Company, subject to the right of said defendant to con-

struct and maintain its railroad tracks on that portion of its right of way as to which there has been no abandonment thereof by said defendant and its predecessors in title.

(5)

That the defendants Gail Heath and The Baltimore & Ohio Railroad Company have no right, title or interest in and to the oil, gas and other minerals under the right of way of said The Baltimore & Ohio Railroad extending through the South Half of the Southeast Quarter of said Section 7.

(6)

That defendants Gail Heath and The Baltimore & Ohio Railroad Company and each of them and their respective agents, officers, employees and assigns are hereby permanently enjoined from conducting or endeavoring to conduct oil and gas drilling operations on, and producing oil and gas from, any part of the lands covered by the oil and gas leasehold estates owned and held by the plaintiff as hereinabove described, including the entire South Half of the Southeast Quarter of Section 7, Township 3 North, Range 12 West, Lawrence County, Illinois, and especially the railroad right of way extending across and through the aforesaid lands; and said defendants are further permanently enjoined from operating or endeavoring to operate any well heretofore drilled by them for the production of oil and gas, including the one known as Heath Well #2-A, on the railroad right of way extending through the South Half of the Southeast Quarter of said Section 7—all so long as the leases held by the plaintiff on the above described lands are in force and effect.

(7)

That a mandatory injunction is hereby entered and under it said defendants are ordered and directed to abandon and plug the producing well known as Heath Well #2-A which has been drilled on the railroad right of way running through the South Half of the Southeast Quarter of said Section 7, and said defendants are further ordered and directed to remove from said right of way any and all machinery, equipment and supplies that they now have on said premises and used in, on and about the operation of said well and the production of oil and gas from said premises.

(8)

That defendants Gail Heath and The Baltimore & Ohio Railroad Company pay all costs of this proceedings to be taxed by the Clerk of this court and that execution issue therefor.

Entered this 15 day of March, 1965.

/s/ Casper Platt
Judge of the United States
District Court for the Eastern
District of Illinois

(Seal)

An Act to Amend the Law Condemning Right of Way for Purposes of Internal Improvement, In force June 22, 1852.[1]

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That when any public road, railroad, plank road, turnpike-road, canal, or other public work shall have been located by any officer or agent of the State or of any county, or any person or corporation vested with power to take and apply private property in the construction or use of such road, canal, or other work, or for any purpose connected with the same, such as constructing bridges, dams, locks, embankments, excavations, spoil banks, turnouts, depots, engine-houses, shops, turntables, boat yards, wharves, or docks, and the right or title to property required for any such uses or purposes cannot be obtained by purchase, a petition shall be filed in the clerk's office of the circuit court of each county, through which the location aforesaid is made, setting forth by reference, the authority to construct the work, and the right to take and apply private property, and if the right of way only is desired, describing by its numbers, or other appropriate description, each lot or parcel of land over or across which such right is desired; or if property is required for all or any of the other purposes herein specified, stating such purpose, and describing the property so required; and in either or both cases, stating the names of all persons interested, as owners or otherwise, in the property to be affected, if known, or if

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[1] This Act also appears as §§ 7-24, inclusive, of Ch. 92 entitled "Right of Way" of Gross' Statutes of Illinois 1818-1869, 3d ed. (published by E. L. and W. L. Gross 1870).

not known, stating that fact, and requesting such court to cause to be ascertained the compensation to be made to each owner of, or person interested in, property required as aforesaid, and upon payment thereof to require a conveyance or release of the same, or that by an order or orders of court, the right and title be invested in the state, county, corporation, or other person in whose name or behalf the petition is filed, to be applied and used for the purposes stated in the petition.

§ 2. Upon the filing of the petition aforesaid, and giving the persons interested in the property required reasonable notice thereof, and of the time and place of making the application herein provided for, the petitioner in person, or by attorney, may apply to the judge of said court, or to the judge of the county court or either of the associate justices of the last named court, to appoint commissioners to fix the compensation to be made to the parties interested as aforesaid, for the right of way over or across land, and for land required for any of the other purposes herein expressed, as well as to assess the damages which may result from the construction and use of the road, canal, or other contemplated work. Upon the hearing of which application, and each of the parties notified as aforesaid as well as those not notified who may appear, the said judge, or associate justices, shall select and appoint three disinterested freeholders of the county commissioners to fix compensation and assess damages, according to the prayer of the petition, and also fix the time and place of their first meeting. And upon notices given as aforesaid, from time to time, or the appearance of parties without notice, the same or other commissioners shall be appointed to act with reference to parties, as they are notified, or appear, as aforesaid, until action shall be had with refer-

ence to all the parties and matters named in the petition; provided, that reasonable notice of the time and place of making application for the appointment of commissioners shall be five days, and one day in addition for every twenty miles travel from the residence of the party to the place of making application.

§§ 3 and 4. * * *

§ 5. Commissioners appointed as aforesaid shall be sworn before some officer having power to administer oaths, "to faithfully and impartially execute the duties required of them, according to their best judgment and understanding, and to make all their estimates and assessments according to law." And upon being sworn as aforesaid, they shall meet at the time and place fixed by the court, or judge or justices aforesaid, and proceed without delay, upon view and inspection of the premises, as well as upon hearing the allegations and testimony of the parties interested, to fix the compensation to be made to each party or owner of lands to be taken and used as the way on which the road, canal or other work shall be constructed and pass, also for lands taken and used for any of the other purposes specified in this act; and also estimate and assess the damages sustained by any person or persons, by reason of the construction and use of the work specified in the petition, taking into consideration and estimating the benefits and advantages to the parties resulting from the construction and use of the road, canal, or other improvement: *provided*, the said commissioners shall not estimate any benefits or advantages which may accrue to lands affected in common with adjoining lands, on which such road or canal or other work does not pass.

§ 6. The commissioners shall, from time to time, as they make decisions with reference to lands embraced in their appointment, make reports in writing, stating separately

the compensation to be paid for the right of way over or upon each lot of land, the compensation to be paid for each lot of land required for any other purpose, and the damage allowed to each owner or party by reason of the construction and use of the improvement or work as aforesaid. A copy of each report so made shall be delivered to each of the parties interested, if requested, and the original, with a copy of the order of appointment, shall be filed with the clerk of the court in which the proceedings is had.

§ 7. Upon the making and filing of any report as aforesaid, any party interested may appeal from the decision of the commissioners to the circuit court of the county, as hereinafter provided; but if no appeal is taken, the decisions, estimates and assessments as reported, shall be conclusive upon the parties, and the right and title of that part of each lot or parcel of land required as aforesaid, in respect to which no compensation is allowed or damages assessed, should vest in the state, county, corporation or person in whose behalf the proceeding is had, with the right to enter upon and use and apply the same according to the prayer of the petition and right of the case, and the right and title to that part of each tract of land required, in respect to which compensation is allowed or damages assessed, shall vest in the state, county, corporation or person petitioning as aforesaid, upon the payment of the compensation and damages so fixed or assessed, with the right to enter upon and use and apply the same for the purposes stated in the petition.

§§ 8-13. * * *

§ 14. Appeals shall bring before the court the questions decided or reported on by the commissioners in respect to the parties to the appeal, and unless the parties otherwise agree, the said questions shall be submitted to and tried by a jury as other appeal cases—the jury to swear "well and truly to try the cause, and in fixing compensation or assessing damages, they will be governed by the provisions of the law under which the trial is had." The jury shall find and state the amount, if any thing, which shall be paid as compensation for right of way; the amount, if any thing, to be paid for lands required for any other purpose; and the amount, if any thing, assessed or allowed as damages, making the verdict conform to the questions and facts in the case. Verdicts may be rendered in writing or stated orally in court, and the court shall in all cases require the verdict to be recorded in such form as to express truly and fully the finding of the jury.

§ 15. Upon verdicts rendered by juries, judgments shall be entered declaring that upon the payment of compensation and damages, or either, as the case may be, that the right and title to the same for which the compensation is to be made, or on account of which damages are allowed, shall vest in the state, county, corporation, or person petitining as aforesaid, with the right to enter upon, use and apply the same for the purposes stated in the petition; or if the verdict is that no compensation shall be made in money, or damages be allowed in the premises, the like judgment shall be entered; and verdicts and judgments entered as aforesaid shall be final and conclusive between the parties.

§§ 16-8. • • •

§ 19. All corporations heretofore created by special charter of incorporation or under the general law where the termini have been fixed by the legislature, and none others, may avail themselves of this act.

§ 20. • • •

§ 21. This act to take effect and be in force from and after its passage.

Approved June 22, 1852.

SECTION 1 OF "AN ACT IN REGARD TO LIMITATIONS" Approved April 4, 1872, Laws 1871-1872, p. 556, Illinois Revised Statutes (1961) Ch. 83 "Limitations"

§ 1: No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises, except as now or hereafter provided in subsequent sections of this Act.

AN ACT to incorporate the Ohio and Mississippi Railroad Company, and for other purposes. In force Feb. 12, 1851

Section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly,* That Joseph G. Bowman, Sidney Breese, James Hall, Alfred Kitchell, Arthur McCauley, George W. Pace, Benjamin Bond, James L. D. Morrison, A. T. Ellis, John Ross, Luther M. Kennett, John O'Fallon, James H. Lucas, Andrew Christy, Daniel D. Page, John Law, Peter Chouteau, jr., Benjamin F. Rittenhouse, Samuel B. Chandler, John A. McClernand, John S. Martin, Aaron Shaw, William W. Roman, Green C. Crosson, and such other persons as may associate with them for that purpose, are hereby made and constituted a body corporate and politic, by the name and style of "The Ohio and Mississippi Railroad company," with perpetual succession, and by that name and style shall be capable in law of taking, purchasing, holding, leasing, selling and conveying estate and property, whether real, personal or mixed, so far as the same may be necessary for the purposes hereinafter mentioned, and no further; and in their corporate name may sue and be sued, to have a common seal, which they may alter or renew at pleasure, and may have and exercise all powers, rights, privileges and immunities which are of may be necessary to carry into effect the purposes and objects of this act, as the same are hereinafter set forth.

§ 2. The Ohio and Mississippi Railroad company shall have full power and authority to locate, and from time to time to alter, change, re-locate, construct, re-construct, and fully to finish, perfect and maintain a railroad, with one or more tracks, commencing at Illinoistown, on the Mississippi river, in the county of St. Clair, and running from

thence, on the most eligible route, to the east line of the state of Illinois, in the direction of the city of Vincennes, in the state of Indiana, and to transport, take and carry property and persons upon said railroad, by power or force of steam, or of animals, or of any mechanical or other power, or combination of them, which said company may choose to use or apply. And for the purpose of constructing said railroad or way, said company shall have authority and power to lay out, designate and establish their road, in width not exceeding one hundred and fifty feet, through the entire line thereof, and may take and appropriate to their own use all such lands so designated for the line and construction of said road, upon first paying or tendering therefor such amount of damage as shall have been settled by appraisal, in the manner hereinafter provided, on all such lands as may be taken, or upon any track which may be located by said company, and for the purpose of cuttings and embankments, and for the purpose of obtaining of stone, sand and gravel, may take and appropriate as much more of land as may be necessary for the proper construction, maintenance and security of said road, and for the construction and security of said road, and for constructing shops, depots, and other suitable, proper and convenient fixtures, in connection with and appurtenances to said railroad, may take and have, use and occupy any lands upon either side of said railroad, not exceeding two hundred feet in depth from said railroad; said company taking all such lands as gifts, or purchasing or making satisfaction for the same, in the manner hereinafter provided: *provided*, that this section shall not be construed to restrict or prevent the construction of public roads, or canals, or railroads, across the road of said company, when deemed expedient, but so as not materially to impair or obstruct the same.

§ 3. * * *

§ 4. The said company shall have power and authority to receive, take and hold all such voluntary grants and donations of land and real estate for the purposes of said railroad, as may or shall be made to said company, to aid in the construction, maintenance and accommodation of said railroad; and said company may contract and agree with the owners or occupiers of any land upon which said company may wish to construct said railroad or way, or which said company may wish to use or occupy for the purpose of procuring stone, sand, gravel or earth, or other materials, to be used in embankments or otherwise, in or about the construction, repair, or enjoyment of said railroad, or which said company may wish to use or occupy in any manner or for any purpose or purposes connected with said railroad, for which said company is empowered or authorized by this act to take, have or appropriate any lands, and to receive and take grants and conveyances of any and all interests and estates therein, and to them and to their successors or assigns in fee, or otherwise; and in case said company cannot agree with such owners or occupiers of such lands as aforesaid, so as to procure the same by the voluntary deed or act of such owners or occupiers thereof, or if the owners or occupiers, or any or either of them, be a *femme covert*, infant, *non compos mentis*, unknown or out of the county in which the land or property wanted may lie or be situate, the same may be taken and paid for, if any damages are awarded, in the manner provided for in "An act to provide for a general system of railroad incorporations," approved November 5th, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, privileges, franchises and immunities in said act contemplated; and provided that

any appeal that may be allowed under the provisions of the act above recited, or by virtue of any general law of this state, shall not affect the possession by said company of the land appraised; and when the appeal may be taken or writ of error prosecuted by any person or persons other than the said company, the same shall not be allowed except on the stipulation of the party so appealing or prosecuting such writ of error, that the said company may enter upon and use the lands described in the petition for the uses and purposes therein set forth, upon said company giving bond and security, to be approved by the clerk of said court, that they will pay to the party so appealing or prosecuting such writ of error, all costs and damages that may be awarded against them on the final hearing of such appeal or writ of error, within thirty days after the rendition thereof, or forfeit all right to use the land or way so condemned.

§§ 5-16. • • •

§ 17. The said company hereby chartered shall be required • • •.

§ 18. • • •

§ 19. This act shall be deemed and taken as a public act, and shall be in force from and after its passage; • • •

Approved Feb. 12, 1851.

AN ACT TO PROVIDE FOR A GENERAL SYSTEM OF RAILROAD INCORPORATIONS,[2]

In Force November 5, 1849

Sec. 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, that any number of persons, not less than twenty-five, being subscribers to the stock of any contemplated railroad, may be formed into a corporation for the purpose of constructing, owning and maintaining such railroad, by complying with the following requirements:

* * *

Sections 2-20 * * *

Section 21. Every such Corporation shall possess the general powers and be subject to the general liabilities and restrictions expressed in the special powers following, that is to say:

1st. * * * *

2nd. To receive hold and take such voluntary grants and donations of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of said Railroad, but the real estate thus received by voluntary grants shall be held and used for the purposes of such grants only.

3rd. To purchase, and by voluntary grants and donations receive and take and by its officers, engineers and surveyors and agents enter upon and take possession of and hold and use all such lands and real estate and other

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[2] This Act also appears as §§ 39-84, inclusive, of Ch. 86a entitled "Railroads" of Gross' Statutes of Illinois 1818-1869, 3d ed. (published by E. L. and W. L. Gross 1870).

property as may be necessary for the construction and maintenance of its Railroad and stations, depots, and other accommodations necessary to accomplish the object for which the Corporation is created, but not until the compensation to be made therefor as agreed upon by the parties ascertained as hereinafter prescribed be paid to the owner or owners thereof, or deposited as hereinafter directed, unless the consent of such owner be given to enter into possession.

4th. To lay out its road, not exceeding six rods wide, and to construct the same and for the purposes of cuttings and embankments and procuring stone and gravel may take as much more land within the limits of its charter, in the manner provided hereinafter as may be necessary for the proper construction and security of the Road.

5th.-11th * * *

Section 22. Any number of persons not less than thirteen, intending to organize a Corporation under the provisions of this Act, and every Company that may hereafter organize under this act may present a petition to the Legislature, stating the place from and to which they propose to construct their Road, and its location and route with reasonable certainty, or that they intend to run the said Road on the most direct and eligible route between the points of terminis and praying the Legislature to determine whether the construction of the said proposed Road will be of sufficient public use to justify the taking of private property for the construction of the same. And if the Legislature shall determine and decide by law that such proposed Road will be of sufficient public utility to justify the taking of private property for the constructing and maintaining said Road under the provisions of this

act then such Company when organized may enter upon, take possession of and use all such lands, real estate, as may be required for the construction and maintenance of their Railroad, and the covenant accommodations appertaining to the same, making compensation in the manner hereinafter provided for all lands real estate thus taken possession of and used, except such as may be voluntarily given to or purchased at an agreed price by the said Corporation. Whenever the said Corporation shall not have acquired by gift or purchase any land real estate so required as aforesaid, or which may be affected by any operation connected by such construction and maintenance the said Corporation may present to the Circuit Court of the district where said lands or real estate shall lie a petition signed by its attorney or agent describing with convenient accuracy and certainty by map or otherwise the lands or real estate so required to be taken or affected as aforesaid setting forth the name and residence of each owner or other person interested therein as owner, lessee, incumbrances as far as known to such Attorney or agent or appearing of record and praying the appointment of Commissioners to ascertain the compensation to be made to such owners and persons interested, for the taking or injuriously affecting such land or real estate as aforesaid. The Court shall have satisfactory evidence that notice of an intended application and the time and place thereof for the appointment of Commissioners of appraisement between said Corporation and the owners and persons interested in such lands and real estate had been given at least ten days previously to such owners personally or to some person of suitable age at their residence or on the premises, or by the publication thereof in a news-

paper printed in the County in which such lands or real estate may lie, such publication to be allowed only in respect to owners who shall appear by affidavit to have no residence in the County known to such Agent or Attorney whereat such notice could be delivered as aforesaid. The Court may adjourn the proceedings from time to time, shall direct any future notice thereof to be given that may seem proper, shall have proofs and allegations of all parties interested touching the regularity of the proceedings and shall by an entry in its minutes appoint five competent and disinterested persons Commissioners to ascertain such compensations as aforesaid specifying in such entry a time and place for the first meeting of such Commissioners. The said Commissioners before entering upon the duties of their office shall take the oath required by the laws and Constitution of this State, and any one of them may administer oaths to witnesses produced before them — and may adjourn and may hold meetings for that purpose.

Whenever they shall meet to hear proofs and allegations unless by appointment of the Court or pursuant to adjournment they shall cause reasonable previous notice of such meetings to be given to the said owners or parties interested, or their Attorney or agent, and may each of them issue subpoenas and compel witnesses to appear and testify they shall hear the proofs and allegations of the parties and any three or more of them after reviewing the premises without fear or favor, or partiality, ascertain and certify the compensation proper to be made to the said owners and parties interested for the lands or real estate to be taken, as well as all damages accruing to the owner of the lands and real estate aforesaid, taken in consequence of the condemnation of the same or injuriously affected as aforesaid — making such deduction or allowance for real benefit or advantages which such owners or

parties interested may derive from the construction of said Road, and may in their discretion assess a separate reasonable sum in favor of such owners and parties interested or of any person appointed by the Court to appear as Attorney for them for costs expenses and reasonable counsel fees. They or a majority of them shall make subscribe and file with the Clerk of the County or with the Clerk of the County Commissioners' Court in which such lands or real estate shall lie, a certificate of their said ascertainment and assessment in which such lands or real estate shall be described by map or otherwise with convenient accuracy and certainty. The Court upon such certificate and due proof that such compensation and separate sums, if any be certified have been paid to the parties entitled to the same, or have been deposited to the credit of such parties in the State Treasury or other place for that purpose approved by the Court shall make and cause to be entered in its minutes a rule describing such lands or real estate in manner aforesaid such ascertainment of compensation with the mode of making it and such payment or deposit of the same compensation as aforesaid a certificate copy of which rule shall be recorded and indexed in the proper Recorder's Office, in like manner and with the like effect as if it were a deed of conveyance from the said owners and parties interested to the said Corporation. Upon the entry of such rule the said Corporation shall become seized in fee of all the lands and real estate described in said rule as required to be taken as aforesaid — during the continuance of the Corporation by this or any subsequent act and may take possession of and hold and use the same for the purposes of said Road and shall thereupon be discharged from all claim for any damages by reason of any matter specified in said petition, certificate, or rule of said Court.

* * * * *

And the Legislature hereby reserves (the right) to itself to indicate the routes and termini of said roads, and the same shall not be constructed or commenced without the expressed sanction of the Legislature of this State, by a law to be passed hereafter.

Sections 23-45 • • • •

Sec. 46 This Act shall take effect and be in force from and after its passage.

Approved Nov. 5, 1849